

SERVICE DATE – JANUARY 29, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1106X

ABE FAIRMONT, LLC—ABANDONMENT EXEMPTION—IN FILLMORE COUNTY,
NEB.

Docket No. AB 6 (Sub-No. 488X)

BNSF RAILWAY COMPANY—DISCONTINUANCE OF SERVICE EXEMPTION—IN
FILLMORE COUNTY, NEB.

Docket No. AB 492 (Sub-No. 2X)

FILLMORE WESTERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN
FILLMORE COUNTY, NEB.

Digest:¹ This decision permits BNSF Railway Company to discontinue its trackage rights over approximately 0.77 miles of rail line in Fillmore County, Neb., and for ABE Fairmont, LLC, to abandon its common carrier rail service over approximately 2.77 miles of rail line also in Fillmore County, Neb., subject to standard employee protective conditions. The Board also retroactively waives the notice of consummation requirement in Docket No. AB 492 (Sub-No. 2X) for abandonment of 6.30 miles of rail line formerly owned by Fillmore Western Railway Company.

Decided: January 25, 2018

On July 7, 2014, ABE Fairmont, LLC (ABE), and BNSF Railway Company (BNSF) (collectively, Petitioners) jointly filed a petition in Docket No. AB 1106X and Docket No. AB 6 (Sub-No. 488X) requesting exemptions under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903. ABE requests an exemption to permit it to abandon a rail line extending southward for 2.77 miles (between mileposts 0.93 and 3.70) from a connection with BNSF's east-west main line (at BNSF milepost 114.73) at Fairmont, Fillmore County, Neb. (the Line). (Pet. App. 4, at 3; Draft Envtl. & Historic Report, App. 3.) As relevant to this decision, the Line is composed of two segments: the Northern Segment, between mileposts

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

0.93 and 1.70, and the Southern Segment, between mileposts 1.70 and 3.70. BNSF requests an exemption to permit it to discontinue its trackage rights operations over the Northern Segment. On July 24, 2014, the Board held Docket No. AB 1106X and Docket No. AB 6 (Sub-No. 488X) in abeyance at Petitioners' request pending discussions between Petitioners and The Andersons, Inc. d/b/a O'Malley Grain Company (The Andersons), a shipper that owns a grain loading facility and private spur track that connects to the Line, regarding concerns about the proposed abandonment and discontinuance. (Pet'rs Mot. 1, July 23, 2014.) On August 17, 2017, the Board removed the proceedings from abeyance at Petitioners' request and directed Petitioners to provide certain additional information. ABE Fairmont, LLC—Aban. Exemption—in Fillmore Cty., Neb. (August Decision), AB 1106X et al. (STB served Aug. 17, 2017). On September 26, 2017, Petitioners filed a supplement to their petition.

The Board will grant the exemptions from 49 U.S.C. § 10903 as discussed below, subject to standard employee protective conditions.

BACKGROUND

Petitioners state that the Line was owned and operated for many years by BNSF's predecessors as part of a nearly 65-mile cluster of branch lines extending in a generally southerly direction from what is now BNSF's east-west main line at Fairmont. (Pet. 5.) In 1996, a predecessor of BNSF sold that cluster of branch lines to Fillmore Western Railway Company (FWRY). (*Id.*) The sale included an approximately 8.3-mile rail line, which was composed of the Southern Segment (from milepost 1.70 to 3.70) and a segment south of the Line (from milepost 3.70 to 10.0, near Geneva, Neb.) (the FWRY Segment), collectively referred to as the FWRY Line. BNSF's predecessor retained ownership of the 0.77-mile Northern Segment (from milepost 0.93 to 1.70). See Fillmore W. Ry.—Acquis. & Operation Exemption—Burlington N. R.R., FD 33299 (STB served Dec. 12, 1996). (*See also* Suppl. to Pet. 4.) BNSF and its predecessor have used the Northern Segment to provide rail service to The Andersons. (Suppl. to Pet. 5.)

In 2001, FWRY obtained an exemption from the Board to abandon the FWRY Line. See Fillmore W. Ry.—Aban. Exemption—in Fillmore Cty., Neb., AB-492 (Sub-No. 2X) (STB served Nov. 20, 2001). (*See also* Pet. 5.) Petitioners state that FWRY took the normal steps necessary to consummate an authorized abandonment, including removing tracks from milepost 3.70 to milepost 10.0, canceling tariffs, and discontinuing service. FWRY sold the underlying real estate that had once constituted the FWRY Line to adjoining landowners.² According to Petitioners, FWRY did not salvage the Southern Segment, from milepost 1.70 to milepost 3.70, to preserve the connection with the Northern Segment and facilitate the construction of a new ethanol plant to be located adjacent to that portion of the FWRY Line.

² As an exhibit to the supplement to the petition, Petitioners provide examples of deeds and tax records filed at the Fillmore County Register of Deeds that describe the land as "Abandoned RR ROW" and "RR ROW." (*See* Suppl. to Pet. 11, Ex. 1.) Petitioners state that collectively the land records are for real estate that once comprised the entirety of the FWRY Line. (Suppl. to Pet. 5 n.9.)

(Suppl. to Pet. 5.) Petitioners state that FWRY intended to use the Southern Segment as private track to serve the new ethanol plant. (*Id.* at 6.) Petitioners claim that the landowners, BNSF, and the communities of Fairmont and Geneva also all considered the common carrier obligation on the FWRY Line to be extinguished. (*Id.* at 5.) FWRY, however, never filed a notice of consummation for the abandonment, as required by the Board's regulations. (Pet. 7; Suppl. to Pet. 5); see 49 C.F.R. §§ 1152.29 (e)(2), 1152.50 (e).

In 2006, ABE purchased the Southern Segment and the underlying real property from FWRY and began construction of the new ethanol plant. (Suppl. to Pet. at 5, 6.) ABE did not obtain Board acquisition or operating authority as it believed that FWRY had abandoned its line and that it was thus not under the Board's jurisdiction. (See Pet. 5.)

In 2012, Flint Hill Resources Fairmont, LLC (FHR-Fairmont) purchased the ethanol plant from ABE. During due diligence prior to that purchase, FHR-Fairmont discovered that FWRY had failed to file its consummation notice for abandonment of the FWRY Line. (Pet. 6; Suppl. to Pet. 6.) Due to the possibility that that line had not been properly abandoned, FHR-Fairmont did not purchase the Southern Segment when it purchased the ethanol plant because it did not want to become a common carrier. (Suppl. to Pet. 6.) As a result of FHR-Fairmont's due diligence, ABE became aware that FWRY had not filed its notice of consummation and that ABE may have acquired a regulated line of railroad from FWRY when it purchased the Southern Segment in 2001. (Pet. 6.) Accordingly, ABE sought after-the-fact Board authority to acquire the Southern Segment from FWRY. At the same time, ABE sought authority to acquire the Northern Segment (from milepost 0.93 to milepost 1.70) from BNSF. (Pet. 6-7.) ABE obtained Board authority to acquire and operate over the Southern and Northern Segments (i.e., the Line) in 2012. See ABE Fairmont, LLC—Acquis. & Operation Exemption—Fillmore W. Ry., FD 35673 (STB served Sept. 21, 2012); ABE Fairmont, LLC—Acquis. & Operation Exemption—BNSF Ry., FD 35683 (STB served Oct. 31, 2012, updated July 19, 2013). As part of ABE's acquisition of the Northern Segment, BNSF retained trackage rights over that section to provide rail service to The Andersons' grain loading facility located on the spur line owned by The Andersons and connected to the Northern Segment. ABE Fairmont, FD 35683, slip op. at 1; (see also Pet. at 7).

Pursuant to the joint petition at issue here, ABE seeks authority to abandon the Line (both the Northern and Southern Segments), and BNSF seeks to discontinue its trackage rights over the Northern Segment. Petitioners indicate that, once the Line is legally abandoned, ABE anticipates selling it to FHR-Fairmont. (Pet. 3, 7; Suppl. to Pet. 6.) FHR-Fairmont would operate the Line as private industry track. (Pet. 4; Suppl. to Pet. 6.) Petitioners state that for the nearly three years that these proceedings were held in abeyance, FHR-Fairmont, The Andersons, ABE, and BNSF worked "to ensure that the proposed abandonment and discontinuance adequately protects FHR-Fairmont's and The Andersons' common interest in continued safe and operationally efficient rail service for both shippers." (Suppl. to Pet. 7, 15.) According to Petitioners, the Industry Track Agreements (ITAs) they crafted provide extensive remedies and safeguards for service failures and/or the failure of the anticipated owner of the Line, FHR-Fairmont, to maintain the track. (Suppl. to Pet. 4, 14 n.20.) Under the ITAs, BNSF would retain the contractual right to operate over portions of the Line to continue to provide rail service to FHR-Fairmont and to The Andersons. (Pet. 4.)

DISCUSSION AND CONCLUSIONS

At Petitioners' request, in July 2017, the Board reactivated this proceeding but requested further explanation from Petitioners on two issues: whether the abandonment would result in a stranded segment and whether the abandonment would be consistent with the Board's recent precedent on post-abandonment contract carriage. The Board also directed Petitioners to consult with the Board's Office of Environmental Analysis (OEA) on how to proceed with the environmental review given that the Draft Environmental and Historic Report (Draft Report) had been prepared nearly five years earlier. Following review of Petitioners' supplemental filings, the Board will retroactively waive the notice of consummation requirement for the FWR Y Segment, thus eliminating the possibility of a stranded segment. The Board also finds that the Petitioners have structured their transactions in a way that addresses the Board's concerns regarding post-abandonment contract carriage. Accordingly, the Board will exempt from the prior approval requirements the abandonment of the Line and the discontinuance of service over the Northern Segment, as explained below.

The Stranded Segment Issue.

In the August Decision, AB 1106X et al., slip op. at 3, the Board noted that it was not clear from the record whether the proposed abandonment would result in a stranded segment³ of track south of the Line, between milepost 3.70 and milepost 10.0 (i.e., the FWR Y Segment). Petitioners confirmed that, even though abandonment authority was granted over the FWR Y Segment, FWR Y never filed a notice of consummation of the abandonment.

Since 1997 railroads have been required to demonstrate their intent to consummate abandonment authority by filing a "notice of consummation" with the agency, typically within one year of being granted abandonment authority.⁴ Because a grant of abandonment authority is permissive, if a railroad does not exercise, or "consummate," its abandonment authority, the line remains part of the national rail network and within the Board's jurisdiction. Honey Creek R.R., FD 34869, slip op. at 3 (citing Hayfield N. R.R. v. Chi. & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984)). The purpose of the notice of consummation requirement is to provide certainty regarding the railroad's intent after receiving abandonment authority. Honey Creek, FD 34869, slip op. at 3; see also Aban. & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C. 10903, 1 S.T.B.894, 904 (1996). The filing of a notice of consummation thus signifies that the railroad has exercised the authority granted and intends the property to be removed from the national rail transportation network. See Honey Creek, FD 34869, slip op. at 3; Aban. &

³ It is well-settled that the Board will not allow track to which a common carrier obligation is attached to become isolated from the rail system as a result of the abandonment of an adjoining segment. See Cent. Or. & Pac. R.R.—Aban. & Discontinuance of Serv.—in Coos, Douglas, & Lane Ctys., Or., AB 515 (Sub-No. 2), slip op. at 12 (STB served Oct. 31, 2008).

⁴ When the Board imposes certain types of conditions on an abandonment, the consummation period is extended until 60 days after the satisfaction of those conditions. See 49 C.F.R. § 1152.29(e)(2).

Discontinuance of Rail Lines, 1 S.T.B. at 894-95, 904-05; see also 49 C.F.R. §§ 1152.29(e)(2), 1152.24(f), 1152.50(e), 1152.60(e).

Here, because FWRY never filed its notice of consummation, the FWRY Segment would become stranded if the Board were to authorize, and ABE were to consummate, abandonment of the Line. (Suppl. to Pet. 9.) However, Petitioners point to the unique factual circumstances in this proceeding and ask that the Board retroactively waive the consummation notice requirement for the FWRY Segment. (*Id.* at 10.) As Petitioners note, FWRY no longer appears to exist as a corporate entity, the principal former owner appears to be deceased, and the real estate underlying the FWRY segment has been sold to multiple adjoining landowners. (*Id.* at 10-12.)

Given the unique circumstances here, the Board will grant Petitioners' request and waive the notice of consummation requirement for the FWRY Segment from milepost 3.70 to milepost 10.0, retroactive to the effective date of the exemption in that proceeding, July 27, 2001. Therefore, Petitioners' requested abandonment would not result in stranding the FWRY Segment as it is now considered abandoned and no longer part of the interstate rail network.

Energy Solutions Precedent.

As noted in the August Decision, while these proceedings were in abeyance, the Board issued a decision in Energy Solutions, LLC—Abandonment Exemption—in Anderson & Roane Counties, Tenn., AB 1128X (STB served Oct. 13, 2015), which the Board indicated could have bearing here. In Energy Solutions, a common carrier owned a seven-mile rail line on which it moved its own traffic as well as traffic from five other shippers. The carrier sought authority to abandon the line, but proposed to continue serving all of the existing shippers on the line under contract after abandonment. The Board denied the petition to abandon, in part, because the five shippers that remained on the line, despite their continued rail service pursuant to contract, would lose their regulatory remedies for service failures or inadequacies without any mitigating factors to protect them. In that decision, the Board stated that, among other things, it could not conclude that removing that line from the national rail system would “ensure the continuation of a sound transportation system to meet the needs of the public.” *Id.* at 3. It explained that with the loss of the common carrier obligation, the carrier could end service at any time, and the shippers would not have any regulatory remedies for service failures or inadequacies. *Id.* The Board also noted that in cases in which it had previously granted petitions to abandon where shippers remained on a rail line, the transactions included protective measures that mitigated the removal of the common carrier obligation. *Id.* at 4 (citing Union Pac. R.R.—Aban. Exemption—in Pottawattamie Cty. Iowa, AB 33 (Sub-No. 300X) et al. (STB served Jan 20, 2012)); cf. CSX Transp., Inc.—Aban. Exemption—in Grant Cty., W. Va., AB 55 (Sub-No. 746X), slip op. at 2-3, n.6 (STB served Feb. 19, 2016) (explaining that the concerns raised in Energy Solutions were not present because, among other factors, the only shipper on the line was also the line owner). To ensure that the authority requested here is appropriate under the Board's exemption procedures, in the August Decision the Board directed Petitioners to explain how their proposal is consistent with the principles articulated in Energy Solutions.

In their supplemental filing, Petitioners argue that the facts here are different from those in Energy Solutions. First, Petitioners state that all shippers affirmatively support discontinuance

of service and abandonment. (Suppl. to Pet. at 14.) FHR-Fairmont and The Andersons both submitted letters in support of the abandonment and discontinuance. (FHR-Fairmont Letter, Sept. 26, 2017; Anderson Inc. Letter, Sept. 26, 2017.) Second, Petitioners state that the ITAs signed by ABE, FHR-Fairmont, The Andersons, and BNSF thoroughly contemplate and adequately address the issues raised in Energy Solutions concerning loss of regulatory remedies upon the conversion to private track. (Suppl. to Pet. 13-14.) Petitioners state that under the ITAs, as long as FHR-Fairmont and The Andersons desire rail service, BNSF has the contractual right to operate over the Line, and should BNSF not desire to operate, the shippers have a right to use a switching carrier to interchange with BNSF. (Id. at 14, n.20.) Furthermore, Petitioners contend that the ITAs provide extensive remedies for failures to serve or to maintain the Line. (Id.) Third, FHR-Fairmont, the eventual owner of the Line, will give The Andersons a perpetual right to service so long as its grain facility requires service and FHR-Fairmont receives service. In the event that FHR-Fairmont no longer desires service, The Andersons have the right to purchase the segment of the Line serving its facility to continue to receive service from BNSF. (Id. at 14-15.) Finally, unlike Energy Solutions, where the line owner and operator represented less than 7% of traffic over the line, here, the eventual line owner, FHR-Fairmont, will represent over 88% of carloads over the Line. (Id. at 14.)

Petitioners have established that the concerns articulated in Energy Solutions are not present and the facts here do not preclude the use of the petition for exemption process. Accordingly, the Board's analysis of the petition is discussed below.

The Draft Environmental and Historic Report.

In the August Decision, the Board directed Petitioners to consult with OEA on how to proceed with the environmental review given that the Draft Report and supplement were prepared nearly five years and four years, respectively, prior to removing the proceeding from abeyance. August Decision, slip op. at 4. After this consultation, Petitioners prepared and distributed a revised and updated Draft Report to confirm that the previously submitted information remained current and had not changed. (Suppl. to Pet. 8.) The Board's conclusions regarding the energy and environmental impacts of the proposed action are below.

Exemption from Section 10903. Under 49 U.S.C. § 10903, a rail line may not be abandoned, or service discontinued, without the prior approval of the Board. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10901; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Here, detailed scrutiny under 49 U.S.C. § 10903 is not necessary to carry out the RTP. Consistent with 49 U.S.C. § 10101 (2), (3), (5), and (9), an exemption will minimize the need for Federal regulatory control over the transportation system, foster sound economic conditions, and encourage efficient management by: (1) allowing BNSF to discontinue service over and avoid the unnecessary expenses associated with retaining trackage rights over the Northern Segment; and (2) permitting ABE to sell the Line to FHR-Fairmont while ensuring that the shippers will have continued rail service provided by BNSF. Further, by minimizing the administrative

expense of the application process, an exemption will expedite regulatory action and reduce regulatory barriers to exit. 49 U.S.C. § 10101 (2), (7), (15).

Other aspects of the RTP will not be adversely affected by use of the exemption process. In particular, the continuation of a sound rail transportation system, 49 U.S.C. § 10101(4), is not adversely affected since the two shippers on the Line both support the abandonment and discontinuance and the parties have entered into ITAs that provide for the continuation of service by BNSF under contract following abandonment and other protective measures to mitigate the removal of the common carrier obligation.

Furthermore, the Board finds that regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. As explained earlier, both shippers on the Line indicate that they believe the negotiated agreements adequately protect their interests and support moving forward with the discontinuance and abandonment. Additionally, Petitioners state that the proposed transaction will have no impact on intermodal or intramodal transportation. (Pet. at 12.) The Board will nonetheless direct BNSF to serve copies of this decision on The Andersons and FHR-Fairmont so that they receive it within five days of the service date, and to certify to the Board contemporaneously that it has done so.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting these exemptions, the Board will impose the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).

Environmental and Historic Review. Petitioners have submitted a revised combined environmental and historic report with their petition and have notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 C.F.R. §§ 1105.7, 1105.8, & 1105.11. OEA has reviewed the report, investigated the environmental record, and analyzed the probable effects of the proposed action on the quality of the human environment.

In an Environmental Assessment (EA) issued on November 24, 2017, OEA concluded that, as proposed, the abandonment of the Line would not significantly affect the quality of the human environment. Comments on the EA were due by December 22, 2017, and no comments were filed. In the Final EA, issued on December 27, 2017, OEA recommended no environmental conditions and concluded that the proposed action would not significantly impact the quality of the human environment.

The Board agrees with OEA that this action will not significantly impact the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The proceeding in Docket No. AB 492 (Sub-No. 2X) is reopened and the Board retroactively waives the notice of consummation requirement for FWRV's notice of exemption to abandon the FWRV Segment from milepost 3.70 to milepost 10.0.

2. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by ABE of the Line from milepost 0.93 to milepost 3.70 and the discontinuance of service by BNSF of the Northern Segment from milepost 0.93 to milepost 1.70, subject to the employee protective conditions set forth in Oregon Short Line.

3. Petitioners are directed to serve a copy of this decision on FHR-Fairmont and The Andersons so that it is received within five days of the service of this decision and certify contemporaneously to the Board that they have done so.

4. An Offer of Financial Assistance (OFA) under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by February 8, 2018, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,800. See 49 C.F.R. § 1002.2(f)(25).

5. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in boldface on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

6. Provided no OFA has been filed, this exemption will be effective on February 28, 2018.

7. Petitions to stay and petitions to reopen must be filed by February 13, 2018.

8. Pursuant to 49 C.F.R. § 1152.29(e)(2), ABE shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by ABE's filing of a notice of consummation by January 29, 2019, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Board Members Begeman and Miller.